SUPREME COURT, U. S.
DEC 30 1974
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

## No. 74-820

MICHAEL J. FINK,
*Petitioner*

*vs.*

UNTIED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HENRY GONZALEZ
620 Madison Street
Tampa, Florida
*Attorney for Petitioner*

FREE PRESS PUB. CO., INC., TAMPA FLORIDA

# INDEX


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| STATEMENT | 2 |
| REASONS FOR GRANTING THE WRIT | 6 |
| CONCLUSION | 9 |
| APPENDIX | 1-A |

## CASES


| CASES | Page |
|---|---|
| *Hansford v. U.S.*, 303 F.2d 219, 1962 | 6 |
| *Mattson v. United States*, 3 Cir., 7 F.2d 427, 428, 1925 | 8 |
| *United States v. Ambrose*, 483 F.2d 742, 1973 | 7, 8 |
| *United States v. Johnston*, 426 F.2d, 112, 1970 | 7 |
| *Washington v. U. S.*, Fifth Cir. 1960, 275 F.2d 667 | 2 |
| **Statutes** | |
| 28 U.S.C. Sec 1254(1) | 2 |

IN THE

# Supreme Court of the United States

No. 74-820

MICHAEL J. FINK,
*Petitioner*

*vs.*

UNTIED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Supreme Ccurt of the United States:

The Petitioner, MICHAEL J. FINK, hereby Petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINION BELOW

The Opinion of the Court of Appeals (Appendix A) is attached hereto and made a part hereof.

## JURISDICTION

The Judgment of the Court of Appeals was entered on October 7, 1974.

A petition for Rehearing was filed and the same was denied on December 6, 1974.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1254(1).

## QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS FOR THE FIFTH CIRCUIT FAILED TO APPLY THE LAW AS STATED IN WASHINGTON v. U. S., FIFTH CIRCUIT COURT OF APPEALS, 1960, 275 F.2d 667; ROCHA v. U. S. FIFTH CIRCUIT COURT OF APPEALS (1968) 401 F.2d 529; U. S. vs. ROBINSON, FIFTH CIRCUIT, 1971, 446 F.2d 562.

2. WHETHER THE FIFTH CIRCUIT ERRED WHEN IT ALLOWED TESTIMONY WHICH WAS REMOTE AND HEARSAY IN CHARACTER AS REBUTTAL TESTIMONY AGAINST CO-DEFENDANT TO THE PREJUDICE OF THE PETITIONER.

## STATEMENT

Following the jury trial in the United States District Court for the Middle District of Florida, Petitioner was convicted on all of the three counts.

The following persons played prominent roles in the trial of this cause: John A. Geders, Defendant, de-

fended by Ralph Rinehart, attorney; Michael J. Fink, Defendant, defended by James Clark, attorney; Randy Kilgore, Defendant, who had plead guilty prior to trial and testified on behalf of the Government; Steven Patrick, Defendant in a related indictment who had previously plead guilty and testified on behalf of the Government; David Butler, pilot and Government informer; Tom Waddington, deceased, alleged co-conspirator; James Mahoney, co-defendant whose trial was severed and Randolph Surles, co-defendant whose trial was severed.

The Defendants, John A. Geders and Michael J. Fink were jointly indicted along with other Defendants in an Indictment charging the Defendants with: (1) Conspiracy to import marijuana (2) Importation of Marijuana, (3) Possession of Marijuana with Intent to Distribute Same.

Trial of the Defendants Fink and Geders commenced on the 9th day of October, 1973, in the District Court in and for the Middle District of Florida. The two Defendants were convicted on all three counts.

Randy Kilgore and Steven Patrick testified that they and the two Defendants had entered into a conspiracy to import marijuana into the United States.

Randy Kilgore contacted David Butler, the informant in Miami and David Butler flew to Tampa on two occasions.

The first occasions he flew Defendant Geders and Randy Kilgore to LeHigh Acres to show them a possible landing site for smuggling activities.

On that trip to Tampa, he brought with him cocaine described as several ounces to one-half pound.

He told Defendants Geders and Randy Kilgore that he was able to bribe customs officials in the Bahamas for safe passage through customs, he was able to get through the United States radar screen, had performed several smuggling trips in the past, and that if the Defendants would go in with him that they would be millionaires in a year.

He returned to Tampa on the 24th day of November, 1972 and met all of the other alleged conspirators.

At that time, it was agreed that he would fly the Defendant Geders and the Defendant Mahoney to Columbia, South America and return with 1,000 pounds of marijuana in exchange for $10,000.00 cash, $2,000.00 to $3,000.00 expenses, and fifty pounds of marijuana worth $12,500.00.

At that time, David Butler, the informant arranged all of the details of the trip, told the Defendants to purchase walkie-talkies for communication between the plane and persons on the ground, to purchase tacks to throw in the road in the event of pursuit, to rent a camper upon which to load the marijuana after the plane landed, to purchase extra gasoline so the plane could be refueled upon unloading and told the Defendants where to land, what escape route to take and the time of departure and arrival.

On Sunday morning, November 26, 1972, David Butler, the informant, James Mahoney and John Geders, Defendants, flew to Columbia, South America, by way of Inagua, Bahamas. On the return trip they landed at Inagua, Bahamas, where David Butler, the informant, claimed he had customs officials bribed.

While David Butler was talking to the customs officials, a native warned the Defendants that David Butler was radioing ahead and the Defendants would be arrested when they returned to the United States.

Upon David Butler's return to the airplane, Defendants informed him of the native's conversation. David Butler claimed the native was only trying to get money from them.

Immediately after the plane took off, the Defendants Geders and Mahoney became frightened and tried to get David Butler to slow the plane down so they could open the doors and dump the marijuana into the ocean.

Although Defendants tried on several occasions to dump the marijuana, David Butler refused to cooperate by slowing the plane down.

He landed the plane in Lee County in the State of Florida. The marijuana was transferred from the plane to the camper, and the two Defendants, Mahoney and Geders, left in the airplane with David Butler.

The camper, driven by Steven Patrick and escorted by Michael J. Fink and Randy Kilgore, left the landing site. The camper was seized by Customs Agents who were waiting for the plane to unload and Michael Fink parked his automobile in a graveyard after being chased by customs patrol officers.

Steven Patrick was arrested immediately with the camper and the other Defendants were not arrested until after the Indictment filed in this cause.

Prior to the trial of this cause, the Defendants made numerous motions for orders authorizing the taking of depositions. These motions were denied.

At the trial of this cause, Defendant sought to interview various Government witnesses, all of whom refused to confer with Defendants' counsel. Defendant moved the Court to enter an order requiring said witnesses to confer with them. This motion was denied by the Court.

At the trial, the Defendants called David Butler, the informant, as a witness and he invoked his Fifth Amendment privilege not to testify.

The Defendant Geders took the stand and testified in his own behalf. After he had testified on direct the Court ordered him not to confer with his counsel for a period of 16½ hours.

After Defendants had rested, the Government called Agent Charles Hudson who testified that he had examined investigative reports in the Hillsborough County Sheriff's Office and interviewed informants who claimed that the Defendant Geders had been involved in previous smuggling activities.

## REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals' decision in affirming the conviction of Petitioner did not consider *Hansford v. U. S.*, 303 F.2d 219, 1962. When the Court in reversing the conviction stated:

> " Testimony by police officer in rebutting claim of entrapment in sale of narcotics as to prior alleged sales made by defendant which officer claim-

ed he had witnessed was inadmissible and prejudicial when testimony of officer was not corroborated by production of alleged contemporaneous police report or otherwise substantially corroborated." *Hansford v. United States of America,* 303 F.2d 219, 1962.

. The factual situation in the present case is also very similar to the factual situation in the case of *U. S. vs. Johnston,* 426 F.2d, 112, 1970. The Court held as follows:

> ". . . admission of the police officer's testimony was error and that the "searching inquiry" into defendant's conduct and predisposition, of which Sorrells speaks, must be controlled in some reasonable manner. As the single incident occurring nine months prior was without corroborating witnesses, was not the subject of an arrest, indictment or conviction, defendant had no opportunity to prepare to defend against it apart from his own unsupported denial. This was considered to be so prejudicial as to outweigh the probative value of the testimony of the issue of predisposition. . ." *U. S. v. Johnston,* 426 F.2d 112, 1970.

Also, see *United States v. Ambrose,* 483 F.2d 742, 1973, which had an almost identical factual situation in reference to this question. In this case, the Government had called Agents to testify that the Defendant was a vendor of narcotics yet neither of them knew this of their own personal knowledge, but it appeared this information had been obtained from telephone callers and it was not shown that those callers either knew the Petitioner personally or were even from his locality, and it was not indicated that the callers' information was obtained first hand.

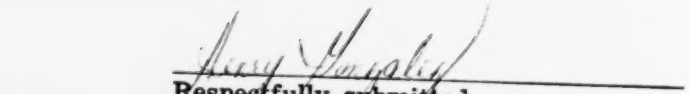
The Court stated as follows:

" Here, at least in the case of the anonymous phone calls, it could well be said that the evidence *** was so indefinite that it gave the defendant no chance or opportunity to refute it. It specified no person who made any of the complaints to which (the agent) testified. It specified no time when, place where, or circumstances surrounding any such complaints which could give the defendant any chance or opportunity to refute or contradict the testimony regarding such complaints, * * *." *Mattson v. United States,* 3 Cir., 7 F.2d 427, 428 (1925). We believe that to the extent that testimony of this character might be utilized by a jury to assay the Appellant's predisposition to commit narcotic offenses, its judgment would be but a surmise from the shadows — a guess in the dark. *Accordingly, we conclude that the admission of hearsay evidence of the character here in issue to show the predisposition of the appellant was highly prejudicial error.*" (Emphasis supplied)

" On this point, we can add little to the excellent discussion of Judge Hartigan in *Whiting v. United States,* supra, in which the Government attempted to show predisposition of the defendant by calling as rebuttal witnesses a police officer who testified that he received anonymous telephone calls informing him that the Defendant trafficked in narcotics, and another police officer and a Government agent who testified that informants had told them that the defendant was involved in the narcotics trade but who admitted that they did not know of any basis for the informants' knowledge of the defendant's activities. In reversing the judgment of conviction, the court held that the hearsay evidence introduced by the Government was impermissibly unreliable and afforded the defendant no fair opportunity to rebut it. . ." United States v. Ambrose, 483 F.2d 742 (1973).

## CONCLUSION

We believe the conflicting views on the issues involved should be resolved by this Honorable Court to avoid an apparent conflict between Circuits on issues which are substantially the same. It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

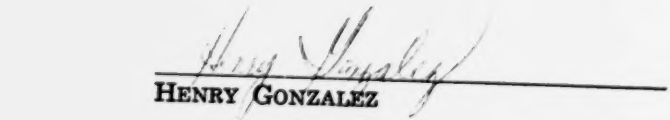


Respectfully submitted,

HENRY GONZALEZ
620 Madison Street
Tampa, Florida
*Attorney for Petitioner*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail on this 26th day of December, 1974, to Anthony J. LaSpada, Esq., Assistant United States Attorney, U. S. Post Office Bldg., Tampa, Florida, and to the Solicitor General, Washington, D.C.



HENRY GONZALEZ

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

NO. 73-3966

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL J. FINK and
JOHN A. GEDERS,

Defendants-Appellants.

---

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING

---

(December 6, 1974)

Before MOORE, AINSWORTH and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Michael J. Fink in the above entitled and numbered cause be and the same is hereby denied.

/s/ Leonard P. Moore
USCJ
2nd Cir.

A-2

Michael J. FINK and John Geders,

Defendants-Appellants.

No. 73-3966

United States Court of Appeals,

Fifth Circuit.

Oct. 7, 1974

Defendants were convicted before the United States District Court for the Middle District of Florida, Ben Krentzman, J., of conspiracy to import marijuana, illegal importation of marijuana and possession of marijuana and they appealed. The Court of Appeals, Moore, Circuit Judge, held that testimony of federal narcotics agent that one defendant had reputation in community as drug smuggler and distributor was admissible to rebut entrapment defense; that refusal to order prosecution witnesses to submit themselves to defense deposition or to order them to discuss case with counsel for defense was within trial court's discretion; and that directing defendant not to discuss his testimony with anyone until after recess did not constitute reversible error absent showing of harm.

Affirmed.

1. Criminal Law §37(1)

Purpose of entrapment defense is to inhibit the use by the Government of pressure tactics which cause the commission of an offense by one who is not ordinarily disposed to commit it.

2. Criminal Law §37(1)

Entrapment defense is not readily available to one who has evidenced an inclination to commit the type of offense with which he is charged.

3. Criminal Law §376

Once defendant indicates his reliance on entrapment defense, Government is permitted to tender evidence on defendant's predisposition to commit the type of crime charged.

4. Criminal Law §376

"Reputation" or "character" evidence is admissible to rebut an entrapment defense.

5. Criminal Law §376

In prosecution for conspiracy to import marijuana and importation and possession of marijuana, testimony of narcotics agent that one defendant had reputation in community as drug smuggler and distributor was admissible to rebut entrapment defense. 18 U.S.C.A. § 371; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 1002(a), 21 U.S.C.A. §§ 841(a)(1), 952(a).

6. Witnesses §274(1)

Refusal to permit defense to question prosecution witness, who had testified in rebuttal of defendant's entrapment defense that defendant had reputation in community as drug smuggler and distributor, concerning specific events or activities of defendant that gave rise to his adverse public image was within trial court's discretion.

7. Criminal Law §379

Character reputation is established not by what one knows to be fact concerning another but by what one has heard in the community about the person in question.

8. Criminal Law §380

Evidence of specific acts or conduct is not admissible to prove or disprove the reputation that a defendant holds in his community.

9. Criminal Law §376

Predisposition to commit crime of type of which the defendant stands accused may be demonstrated for purpose of rebutting entrapment defense by evidence that defendant has reputation of one who has committed a particular type of illegal act in his community.

10. Criminal Law §589(1)

Refusal to grant defendant continuance after prosecution witness had testified in rebuttal of entrapment defense concerning defendant's reputation in community as drug smuggler and distributor was within trial court's discretion.

11. Criminal Law §569

Evidence, inter alia, that defendants had taken part in transferring cargo of marijuana from plane to waiting vehicle sustained determination that defendants were not entrapped through pilot who had informed authorities of plan for importing marijuana and that defendants had not renounced their enterprise of smuggling marijuana, despite contention that defendants had attempted to persuade pilot to slow down during flight to permit cargo to be jettisoned. 18 U.S.C.A. § 371; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 1002(a), 21 U.S.C.A. §§ 841(a)(1), 952(a).

12. Criminal Law §627.5(2)

Except for capital cases, question of extent of defense discovery, at least that discovery which requires judicial assistance, is matter within discretion of trial court. 18 U.S.C.A. § 3432.

13. Criminal Law §627.5(2)

In exercising its discretion with respect to determining extent of defense discovery, trial court must weigh variety of factors and must balance need of accused for depositions requested against possibility that prospective witnesses might be harassed or intimidated as result of their submission to the discovery process.

14. Criminal Law §627.5(2)

Refusal to order prosecution witnesses to submit themselves to defense deposition or to order them to discuss case with counsel for defense was within trial court's discretion in view of clear evidence that defendants were capable of harassment.

15. Criminal Law §666½

Trial court did not improperly refuse to interfere with alleged policy of United States Customs Service prohibiting its agents from discussing facts of pending cases with defense counsel without permission of United States attorney where, when defense counsel reported to trial court that federal agents had refused to speak with defense without permission of United States attorney, trial court stated that defense counsel had the right to talk to any witnesses who wanted to talk with defense counsel and ordered United States attorney to "just stay away."

16. Criminal Law §1166.11

Depriving defendant of assistance of counsel during 16-hour recess by directing him not to discuss his testimony with anyone during the recess did not constitute reversible error absent showing of harm to defendant.

---

Appeals from the United States District Court for the Middle District of Florida.

Before MOORE,* AINSWORTH and RONEY, Circuit Judges.

MOORE, Circuit Judge:

This is an appeal by John Geders and Michael Fink from a judgment of conviction by the United States District Court for the Middle District of Florida, the Hon. Ben Krentzman, *Judge,* entered pursuant to a jury verdict. Appellants were convicted on all three counts of an indictment charging them with: (a) conspiracy to import approximately one thousand pounds of marijuana into the United States in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 371; (b) illegal importation of said marijuana into the United States; and (c) possession of marijuana in violation of 21 U.S.C. § 841(a)(1).

The government alleged that appellants Geders and Fink conspired with seven others, Rufus Randolph Surles, Jr., James M. Mahonev, Randy Kilgore, Fred Fink, Steven Patrick, Tom Waddington (now deceased) and David Butler, to smuggle marijuana into this country by air from Columbia, South America, via Inagua, The Bahama Islands. According to the prosecution, the plot germinated in September 1972 when John Geders, Randy Kilgore and Michael Fink concluded that together they possessed the wherewithal to smuggle a large quantity of marijuana into this country. Geders agreed to provide a South American "contact" or drug supply while Fink promised to find financial backing for the venture. Randy Kilgore assured the others that he would make arrangements with a knowledgeable and trustworthy pilot who would be able and willing to fly the cargo of drugs into the United States undetected.

---

* Hon Leonard P. Moore, Senior Circuit Judge for the Second Circuit, sitting by designation.

Michael Fink made good on his promise. He introduced James M. Mahoney and Tom Waddington to the scheme, and they agreed to supply the necessary capital. After a few false starts, Randy Kilgore found David Butler, a pilot with access to a Piper Aztec aircraft, who was willing to make the trip to Columbia for a $10,000 fee plus expenses and fifty pounds of marijuana. Additional conspirators also emerged. Rufus Randolph Surles, Jr., agreed to provide a trailer, of the type normally used by vacationers on camping trips, to which the marijuana could be transferred once it was landed. Steven Patrick agreed to drive the camping trailer.

In David Butler the other conspirators found not only an able pilot but also a man who seemed well versed in the lore of the smuggling business. On several occasions Butler alluded to his prior experience in the field. He advised his employers to land the marijuana-laden plane at Lehigh Acres, an abandoned housing development near Tampa, Florida, and made other helpful suggestions with respect to the details of the illegal importation. He suggested reentry into the United States via the Bahama Islands where he claimed to have the custom officials bribed; he suggested that the other conspirators, when meeting the plane at the time and place of unloading, should be equipped with walkie-talkies for communication with the plane and should carry roofing nails to strew in the path of would-be-pursuers.

Early Sunday morning, November 26, 1972, David Butler, John Geders and Jim Mahoney boarded Butler's rented plane and took off for Columbia, South America. On the return trip, after stopping at Inagua, the plane landed at the pre-arranged location near Tampa. The marijuana was transferred from the plane to the camper which left the landing site escorted by Randy Kilgore and Michael Fink. The caravan did not get far, however, because federal agents soon closed in. Steven Patrick, the driver of the camping trailer filled with

marijuana, was immediately apprehended. Kilgore and Fink eluded immediate capture but were eventually arrested.

It seems that this well orchestrated scheme never really had a chance for success. The authorities had been informed of the group's plans far in advance by the pilot, David Butler. For his help in thwarting the smuggling attempt, the United States Customs Service agreed to permit Butler to retain the fee paid to him by the other conspirators.

The trial of the conspirators began on October 9, 1973.[1] Prior thereto Randy Kilgore and Steven Patrick pleaded guilty to a single conspiracy count and agreed to testify for the prosecution. Although David Butler was indicted along with the others, the government moved to dismiss the charges against him and the court granted the motion.

As their primary defense at trial, appellants Geders and Fink argued that they had been entrapped by Butler, the government informer. Not only did he assist them in the furtherance of the importation scheme but, according to appellants, Butler induced them to commit the crime and had been paid to do so by the government who hired Butler as a sort of modern day bounty hunter. As a matter of fact, appellant Geders who was traveling in the plane with Butler on the trip from South America, claims that when the plane landed in Inagua before its reentry into the United States he was informed by a native that Butler appeared to be working with the police. After the plane was again in the air, Geders tried to persuade Butler to slow the plane down so that he and Mahoney could dump the marijuana into the sea. Butler ridiculed Geders' appre-

---

1. Defendant James M. Mahoney was granted a severance and his case was tried separately.

hensions and refused to permit anyone to unload the contraband until designated rendevous was made.

The government, on the other hand, insisted that Butler had, at all times, merely assisted a plot which had begun before he entered the picture, and that anything he did which appeared to further the conspiracy was done to gain the confidence of the conspirators, a permissible objective in undercover police work.

The entrapment defense was presented to the jury which, nevertheless, returned a guilty verdict.

On this appeal appellants urge that fourteen separate errors were made in the court below which singly or together compel reversal of the convictions rendered by the jury. Many of the claims raised by the appellants are frivolous and warrant no discussion in this court. Efficiency demands that many of the remaining questions be treated in combination.

## I.

Appellants have broadly attacked the district court's handling of the entrapment issue. They argue: that the government should have been prohibited from introducing unflattering evidence with respect to defendant Geders' reputation; that the defense was unfairly barred from either ascertaining the events upon which this reputation was based or introducing rebuttal character testimony after the prosecution had attacked defendant Geders' reputation; and that the government's participation in the smuggling enterprise through its avowed agent, David Butler, was so pervasive and so critical to the consumation of the crime that any prosecution of the appellants is unconscionable.

Throughout the trial appellants placed substantial reliance on an entrapment defense, *i. e.*, on the argument that they were reluctant participants in a criminal

scheme engineered by a government agent who, for reasons of financial gain, had employed a "tremendous sales pitch" to overcome appellants' natural antipathy toward the commission of illegal acts.

[1-3] The purpose of the entrapment defense is to inhibit the use of pressure tactics by the government which cause the commission of an offense *by one who is not ordinarily disposed to commit it.* See Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958); Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1939). Naturally, the defense is not readily available to one who has evidenced an inclination to commit the type of offense with which he is charged. The government, therefore, once a defendant indicates his reliance on the entrapment defense, is permitted to tender evidence on the defendant's predisposition to commit the type of crime charged.

In this case the prosecution introduced Charles Hudson, a federal Narcotics Agent, who testified that he had talked to confidential informants and had examined intelligence files in the Hillsborough County, Florida, Sheriff's Office and had thereby ascertained that defendant Geders had a reputation in his community as a drug smuggler and distributor. When the defense asked to see the files on which the witness' testimony was based or to be given reference to the specific events contained therein, it was rebuffed by the court which admonished the defense that it would be contrary to the rules of evidence for the prosecution to admit evidence of the specific acts of defendant Geders which gave rise to his unsavory reputation.

[4] It has long been the rule in this Circuit that "reputation" or "character" evidence can be introduced by the government to rebut an entrapment defense. In fact, it has been specifically held that reputation evidence of the sort introduced in this trial is permissible.

> We have repeatedly held that once the defense of entrapment is raised the government may introduce hearsay testimony concerning the defendant's past reputation as bearing upon the defendant's predisposition to commit the crime and the reasonableness of the conduct by the government agents. Washington v. United States, 5 Cir., 1960, 275 F.2d 687; Rocha v. United States, 5 Cir., 1968, 401 F.2d 529; Thompson v. United States, 5 Cir., 1968, 403 F.2d 209. Moreover, in the case of Thompson v. United States, supra, this court specifically approved the use of reputation evidence in the form of testimony which the witness gleaned from the reports of a local police department.

United States v. Robinson, 446 F.2d 562, 563-564 (5th Cir. 1971).

[5-8] Not only was the trial court correct in admitting Agent Hudson's testimony, it was also well within established principles when it refused to permit the defense to question the witness about the specific events or activities of defendant Geders that gave rise to his adverse public image. Character reputation is established not by what one knows to be fact concerning another, but by what one has heard in the community about the person in question. Michelson v. United States, 335 U.S. 469, 482, 69 S.Ct. 213, 93 L.Ed. 168 (1948). Thus, evidence of specific acts or conduct is not admissible to prove or disprove the reputation that a defendant holds in his community. Stewart v. United States, 70 App.D.C. 101, 104 F.2d 234 (1939).

Defendant Geders also argues that after the evidence with respect to his reputation was introduced by the prosecution, he was forbidden from rebutting it, or at least attenuating its impact, by introducing favorable reputation evidence. In fact, all that actually happened was that the court refused to grant the defendant a continuance, after Agent Hudson testified, so that he might search for character witnesses of his own.

Defendant Geders argued that he needed the continuance because Agent Hudson's testimony was of an unexpected and surprising nature.

[9] It is well settled that once a defendant indicates his intention to rely on an entrapment defense, the prosecution can be expected to prove, if it can, that the defendant had a predisposition to commit the type of crime of which he stands accused. In this Circuit predisposition can be demonstrated by evidence that in his community the defendant had the reputation of one who committed a particular type of illegal act. Such evidence can by no stretch of the imagination be considered surprising or unexpected.

[10] In view of the prevailing case law, Agent Hudson's testimony did not introduce a new issue and the decision whether or not to grant a continuance to the defense under the circumstances was well within the discretion of the trial judge. He did not abuse that discretion.

Finally appellants argue that, all things considered, the government's conduct was so unconscionable that the prosecution ought to be dismissed. In making this argument appellants put great emphasis on the testimony of John Geders who stated that on several occasions subsequent to leaving the Bahamas on their return to this country, he and co-defendant James Mahoney attempted to persuade Butler, the police agent and pilot, to slow down so that they might jettison their illicit cargo. According to Geders, Butler refused. Thus, as the defense tells it, the defendants, through Geders and Mahoney, had renounced their criminal enterprise and were attempting to disassociate themselves from it.

* * *

the defendants were entrapped by the government into the commission of the crimes charged. This argument had already been presented to the jury with great

force and we see no reason to interfere with the jury's valuation of it—something that we could do only if we found that the jury had acted upon insufficient evidence or improper instructions. Neither ground is present here. The jury was undoubtedly persuaded by the uncontested fact that once the plane landed all the defendants present, including Geders, took part in transferring the cargo of marijuana to the waiting camper. This course of action seems completely inconsistent with defendant Geders' tale of renunciation and entrapment.

II.

Appellants' second major contention is that their defense efforts were hamstrung by the trial court's refusal to afford them its assistance in their attempts to obtain adequate pre-trial discovery. On numerous occasions the defendants asked the court to order various prosecution witnesses to submit themselves for deposition or, at the very least, to order these witnesses to discuss the facts of the case with the defense attorneys. Their pleas were consistently and, according to appellants, unfairly rebuffed. Appellants argue that the court's refusal to compel discovery left them "deaf, dumb and blind, and totally unable to formulate a proper defense . . ." and constituted a denial of fundamental fairness.

Appellants concede that there is no provision in the Federal Rules of Criminal Procedure, nor anywhere else that specifically directs the trial court to order prosecution witnesses to give depositions to the defense or to submit themselves to pre-trial oral interrogation at the hands of defense counsel. Nevertheless, appellants argue that such action by the trial court, which is not inconsistent with those rules, is vital to the mantenance of procedural fairness as that principle is embodied in the Federal Constitution.

The constitutional status of the right of a criminal defendant to depose witnesses was settled, at least in this Circuit in United States v. Hancock, 441 F.2d 1285, 1286, 1287 (5th Cir.), cert. denied, 404 U.S. 883, 92 S.Ct. 81, 30 L.Ed.2d 63 (1971), where Chief Judge Brown wrote:

> Initially Hancock [the defendant] alleges error of constitutional dimensions by asserting that the Trial Court's denial of his motions for a list of government witnesses and a discovery order *for the purpose of taking their depositions* violated his rights under the Fifth and Sixth Amendments. . . [W]ith the scope of discovery in criminal prosecutions narrower than it is in civil cases, Campbell v. Eastland, 5 Cir., 1962, 307 F.2d 478, 487, cert. denied, 371 U.S. 955, 83 S.Ct. 502, 9 L.Ed.2d 502, and in the absence of a rule which permits the taking of depositions of witnesses who will appear at the trial of a criminal case, we cannot say at this juncture that such a procedure has yet been elevated to a constitutional plane even though some states have seen fit to adopt it.

(Emphasis supplied).

Moreover, appellants' arguments notwithstanding, at last one Circuit Court of Appeals has held that Rule 16(b) of the Federal Rules of Criminal Procedure forbids a trial court from ordering those who will serve as witnesses for the prosecution to submit to defense deposition. *See* United States v. Conder, 423 F.2d 904, 910 (6th Cir. 1970).

---

2. 18 U.S.C. § 3432 requires that in capital cases the defendant be furnished a list of the names and addresses of the witnesses to be called by the government. The special status of pre-trial discovery in capital cases is discussed in Gregory v. United States, 125 U.S.App.D.C. 140, 369 F.2d 185 (1966).

[12] The general view, however, is that, with the exception of capital cases,[2] the question of the extent of defense discovery, at least that discovery which requires judicial assistance, is a matter within the discretion of the trial court. United States v. Richter, 488 F.2d 170, 175 (9th Cir. 1973). That discretion is not easily abused. "Denial of a motion to take a deposition is . . . reviewable on appeal from a judgment of conviction but defendant has a heavy burden to show an abuse of discretion by the trial court, and no defendant thus far has prevailed on such an appeal." C. Wright, I Federal Practice and Procedure § 242 at 482 (1969).

[13] In exercising its discretion the trial court must weigh a variety of factors. For instance, it must balance the need of the accused for the depositions requested against the possibility that prospective witnesses might be harassed or intimidated as a result of their submission to the discovery process. United States v. Cole, 449 F.2d 194, 198 (8th Cir. 1971), cert. denied, 405 U.S. 931, 92 S.Ct. 987, 30 L.Ed.2d 806 (1972).

[14] In this case there was clear evidence that the defendants were capable of harassment. One of the conspirators, who at trial testified as a witness for the prosecution, stated that appellant Geders carried a gun during the smuggling operation which he intended to use against David Butler if he sensed that Butler intended a double-cross. Furthermore, that same witness, Randy Kilgore, expressed his fear that his decision to testify for the prosecution might mark him or the members of his family for some act of revenge by the other conspirators. Under the circumstances we cannot say that the trial judge abused his discretion when he refused to order prosecution witnesses to submit themselves to defense deposition or to order them to discuss the case with counsel for the defense.

Finally, appellants claim that reversible error resulted from the court's refusal to interfere with the

policy of the United States Customs Service which prohibits its agents from discussing the facts of pending cases with defense counsel without the permission of the United States Attorney.

[15] Appellants' argument is well taken to the extent that tradition forbids the prosecution from ordering its witnesses to refuse to answer pre-trial inquiries made by the defense. Canon 39 of the old Canons of Professional Ethics of the American Bar Association and Canon 10 of the Code of Trial Lawyers state that: "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party." However, there is no evidence that the trial court failed to apply the law in this case. When defense counsel reported to the court that Federal Agents Buchanan and Christenberry refused to speak with the defense without the permission of the United States Attorney, Mr. Blasingame, the following colloquy ensued:

> Mr. Rinehart: Right. I feel that at this time we should be able to talk to these witnesses, and that they should be instructed that they should talk to us.
>
> The Court: . . . You have got a right to talk to any witness who wants to talk to you. . . . You can talk to any of them. I will say this you can talk to anybody, period.
>
> When I say "period," I mean there is no limitation.
>
> *And, Mr. Blasingame, you just stay away.*

T. 910-912. (Emphasis supplied).

Appellants' contentions with respect to pre-trial discovery have been based, by and large, on some unfair characterizations of federal criminal procedure.

Appellants have stated both to this court and to the court below that their inability to depose prosecution witnesses completely eviscerated their defense because they were never adequately informed of the charges against them and because they could not effectively employ the invaluable tool of cross-examination.

Appellants rightly point out that "[t]here is a tremendous difference in the words stating a crime in an indictment or an information, and the actual facts that a Defendant must meet at the trial of the cause." Appellants' Brief, at 8. However, they go too far when they conclude that this observation compels the taking of depositions. Appellants are ignoring the provision, made in Rule 7(f) of the Federal Rules of Criminal Procedure, for the issuance of a Bill of Particulars, a provision which was incorporated especially to close the information gap that may exist between the facts contained in the indictment and the factual issues which mature at trial.

Appellants also argue that pre-trial depositions are imperative if the defense is to utilize effectively its right to cross-examine the prosecution's witnesses. Again appellants ignore the fact that the Jencks Act, 18 U.S.C. § 3500, permits them to obtain from the prosecution all material statements made to it by its witnesses for purposes of defense cross-examination.

III.

[16] At one point during the trial, defendant Geders took the stand to testify in his own behalf. After being examined on direct until 4:55 pm. he was tendered for cross-examination. The prosecution moved for a recess at that time in order that cross-examination might be deferred until the following day. The court granted the motion and, after the jury had been withdrawn, it addressed defendant Geders, saying:

> Now, Mr. Geders, will you stand up. I direct you not to discuss your testimony in this case with anyone until you are back here tomorrow morning at 9:30 for the purpose of being cross-examined.

Appellants claim that this order deprived defendant Geders of the assistance of counsel for a sixteen hour period at a crucial stage of the trial in violation of his Sixth Amendment rights. Appellants make no claim of actual prejudice accruing from this deprivation; they argue that they do not have to make such a showing and rely on the authority of United States v. Venuto, 182 F.2d 519 (3rd Cir. 1950), which provides:

> To deprive an accused defendant and his counsel of the right to consult with each other during an eighteen hour court recess was most certainly deprivation of the defendant's constitutional right to consult counsel at all stages of the proceeding. We can find no justification for imposing a restriction of silence between accused and counsel during a trial recess. We reject the Government contention that defendant and his counsel must prove affirmatively the exact prejudice produced by this injunction in a federal prosecution. . . . "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The United States Court of Appeals for the Second Circuit has more recently faced an identical fact situation, however, and it has required the defendant to make some showing of prejudice before the error of the trial court in forbidding lawyer/client consultation for some limited period rises to the status of reversible error.

> Leighton's [the defendant's] objection to the ruling of the trial court that he could not consult with his attorney during the luncheon recess is framed in

> terms of the violation of his right to counsel. . . . At no time during, before, or after the recess, did either Leighton or his attorney indicate that they did in fact have something to discuss which might have affected Leighton's testimony or course of action. Leighton's attorney did object to the judge's ruling, but the objection appears to be an attempt to sow reversible error into the record, rather than an effort to indicate to the trial judge that the attorney and client had something to discuss. . . .
>
> Leighton's reliance upon United States v. Venuto, 182 F.2d 519 (3 Cir. 1950), is misplaced. . . . Its [the ruling forbidding attorney/client communication] application to the defendant was quite plainly uncalled for, and we are unable to understand why it was sought or made as to him. We will not, however, reverse the conviction solely on this ground when we can discern no actual harm to the right of effective assistance of counsel, and are convinced that there was none.

United States v. Leighton, 386 F.2d 822 (2d Cir. 1967).

Because, like the Second Circuit, "we can discern no actual harm . . . and are convinced that there was none," we must reject appellants' contention that defendant Geder's deprivation of the assistance of counsel constitutes reversible error.

We find all other assignments of error raised by appellants to be without merit. The judgment of the district court is therefore affirmed.

# In the Supreme Court of the United States

OCTOBER TERM, 1974

---

No. 74-820

MICHAEL J. FINK, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

---

Petitioner contends that hearsay evidence was improperly adduced by the government to rebut his defense of entrapment by showing his predisposition to commit the offense.

After a jury trial in the United States District Court for the Middle District of Florida, petitioner and co-defendant Geders were convicted of conspiracy to import and illegal importation of marihuana into the United States, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 371, and possession of such marihuana, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to a term of two years' imprisonment, which was suspended, and he was placed on probation for two years. The court of appeals affirmed (Pet. App.).

The evidence showed that petitioner, co-defendant Geders, and co-defendant Kilgore entered into an agreement to smuggle marihuana into the United States. Geders agreed to provide a South American contact, petitioner agreed to obtain financial backing for the trip and the purchase (Tr. 59), and Kilgore agreed to arrange for a pilot. Each carried out his part of the arrangement, bringing several additional conspirators into the plan (Pet. App. A-6—A-7). In November 1972, Geders and the pilot flew in a rented plane to Colombia, South America, where they picked up a load of marihuana. They then returned, via the Bahamas, to Florida. Federal agents subsequently seized the marihuana and arrested petitioner and Geders (Pet. App. A-7—A-8).

At trial, petitioner and Geders claimed that they had been entrapped because the pilot furnished the government with advance information regarding the scheme (Pet. App. A-8, A-9—A-10).

In rebutting the claim of entrapment, the government sought to prove predisposition. A federal narcotics agent testified that he had talked to confidential informants and had examined intelligence files in the Hillsborough County, Florida, sheriff's office and thereby ascertained that co-defendant Geders had a reputation in his community for drug smuggling and distributing. When the defense asked to see the files upon which the witness' testimony was based or to be given reference to the specific events contained therein, it was refused by the court, which admonished the defense that it would be contrary to the rules of evidence for the prosecution to admit evidence of the specific acts of Geders that gave rise to his unsavory reputation (Pet. App. A-10).

Petitioner asserts that reputation evidence is inadmissible hearsay under the cases which he cites. Reputation evidence is, however, admissible as part of the "appropriate and searching inquiry" into the predisposition of the accused that is authorized by *Sorrells* v. *United States*, 287 U.S. 435, 451, and *Sherman* v. *United States*, 356 U.S. 369, 372-373 (Pet. App. A-10—A-11). As the court of appeals stated "'once the defense of entrapment is raised the government may introduce hearsay testimony concerning the defendant's past reputation as bearing upon the defendant's predisposition to commit the crime and the reasonableness of the conduct by the government agents [citations omitted]'" (Pet. App. A-11). Moreover, the court's refusal to permit the defense to question the witness about the specific events or activities that gave rise to his adverse public image was well within the court's discretion. Character reputation is established by what one has heard in the community about the person in question, rather than by actual events or activities. See *Michelson* v. *United States*, 335 U.S. 469; *Stewart* v. *United States*, 104 F.2d 234 (C.A.D.C.).

There is no conflict among the circuits on this issue. The cases on which petitioner relies are inapplicable, since they deal with evidence of *specific* past acts offered to rebut an entrapment defense, rather than with evidence of general reputation, as in the instant case.

In any event, any error in introducing such evidence was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18. There was ample evidence that, despite the pilot's help in perpetrating the scheme, petitioner was fully predisposed to carry it out even without such aid. *United States* v. *Russell*, 411 U.S. 423, 435. The scheme commenced in 1972, when petitioner agreed to make financial arrangements for the purchase and transporta-

tion of the marihuana (Tr. 56-59). Prior to finding a pilot for the scheme, petitioner arranged a meeting of financial backers. Discussion at the meeting centered upon the cost of acquiring the marihuana and the eventual profit from distributing it (Tr. 61). Petitioner thereafter hired the pilot. As one witness testified, however, "the trip was going to go off, whether there was Mr. Butler [the pilot] or not. * * * [T]hey were going to get a pilot, and if it was not Mr. Butler then they were going to have to * * * get one from someplace else" (Tr. 308).

Moreover, the evidence admitted with regard to Geder's predisposition had no bearing upon the jury's finding as to *petitioner's* predisposition. The relevant inquiry for appraising an entrapment defense is personal, depending upon whether the government "actually implants the criminal design in the *mind of the defendant* * * *." *United States* v. *Russell, supra,* 411 U.S. at 436 (emphasis supplied).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

MARCH 1975.

DOJ-1975-03